THE COURT ORDERED that no one shall publish or reveal the name or address of the Respondent who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Respondent or any member of his family in connection with these proceedings.

8 February 2018

PRESS SUMMARY

B (Algeria) (Respondent) v Secretary of State for the Home Department (Appellant)
[2018] UKSC 5
On appeal from [2015] EWCA Civ 445

JUSTICES: Lady Hale (President), Lord Mance (Deputy President), Lord Hughes, Lord Hodge, Lord Lloyd-Jones

BACKGROUND TO THE APPEAL

The Respondent ("B") has been in the UK since 1993. He was originally detained under section 21 of the Anti-Terrorism, Crime and Security Act 2001 and was subsequently subject to a control order under the Prevention of Terrorism Act 2005. On 11 August 2005, he was notified of the Secretary of State's intention to make a deportation order against him on national security grounds. He was detained under Schedule 3 of the Immigration Act 1971 ("the 1971 Act") pending deportation. He appealed, using a false identity, to the Special Immigration Appeals Commission ("SIAC") against his deportation.

The UK Government sought assurances from the Algerian authorities that, if returned to Algeria, B would not be subject to treatment incompatible with Article 3 of the European Convention on Human Rights ("ECHR"). On 10 July 2006, the Algerian authorities confirmed that the details of his identity given by B were those of an individual present in Algeria. On 19 July 2007, SIAC ordered B to provide details of his true identity. On 30 July 2008, SIAC held that the Secretary of State's case against B on the risk to national security had been made out. On 26 November 2010, SIAC held that B had disobeyed its earlier order of 19 July 2007 and imposed a prison sentence on B of four months.

Following his eventual release from prison, bail conditions were imposed on B. On 13 February 2014, SIAC held that there was no reasonable prospect of removing B to Algeria and the ordinary legal basis for justified detention under the Immigration Acts therefore fell away. Thereafter, the Secretary of State did not authorise B's further detention and his bail conditions were relaxed.

B's appeal against the notice of decision to deport him was struck out by SIAC in light of his continuing contempt of court. SIAC also rejected B's submission that, following SIAC's findings of 13 February 2014, it no longer had jurisdiction to grant bail to B or to impose bail conditions. This decision was upheld by the High Court. B appealed to the Court of Appeal, which allowed his appeal on the ground that SIAC had no jurisdiction to impose bail conditions on B if his detention would be unlawful.

On 12 December 2016, SIAC allowed B's substantive deportation appeal. As a result, B's bail fell away and it is common ground that the immigration power is now unavailable. The Supreme Court granted the Secretary of State permission to appeal against the decision of the Court of Appeal on the issue of SIAC's bail jurisdiction.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Lloyd-Jones gives the lead judgment with which the other Justices agree.

REASONS FOR THE JUDGMENT

The so-called *Hardial Singh* principles concerning the operation of the detention power contained in paragraph 2 of Schedule 3 to the 1971 Act form an important part of the background to this appeal. These principles are that (i) the Secretary of State must intend to deport the person and can only use the detention power for that purpose; (ii) the deportee may only be detained for a reasonable period; (iii) if it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period then he should not seek to exercise the power of detention; and (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal **[24-25]**.

At the heart of the case is a dispute about what the correct approach to the availability of immigration bail is when the *Hardial Singh* limit on actual detention is reached. The Secretary of State suggested that a purposive interpretation of the legislation should apply so that bail is available regardless of whether the individual is lawfully detained or would hypothetically be lawfully detained **[28]**. The Court saw no basis for such an approach. It is a fundamental principle of the common law that Parliament is presumed not to intend to interfere with the liberty of the subject without making such an intention clear. This was a situation where the principle of legality was in play. Accordingly, the Court was required to interpret the statutory provisions strictly and restrictively **[29]**.

It was common ground that being "detained" was a condition precedent to the exercise of the power to grant bail conferred by paragraphs 22 and 29 of Schedule 2 to the 1971 Act. Applying the strict approach to interpretation, the Court found that the reference to "detained" means lawful detention **[30-31]**. Furthermore, "detained" does not only refer to the state of affairs which must exist at the time when the power is first exercised. Unless there is a continuing power to detain, the system of bail would encounter substantial difficulties in operation **[32]**. Where it ceases to be lawful to detain a person pending deportation there is no longer a power of detention under paragraph 16 of Schedule 2, and there is therefore no longer a power to grant bail under paragraphs 22 or 29 **[33]**.

The Secretary of State submitted that as both bail and temporary admission or temporary release are "ameliorating possibilities" of alternatives to detention, it is sensible for both powers to persist for some duration beyond the point at which actual detention can no longer continue. Temporary admission or release is covered by paragraph 21 of Schedule 2. However, unlike paragraphs 22 and 29, it refers to a person "liable to be detained" and not "detention" which is a material difference. Accordingly, the comparison does not assist the Secretary of State **[34-39]**.

The Court did not agree with the Secretary of State's submission that the interpretation of paragraphs 22 and 29 favoured by the Court of Appeal would lead to impracticability in their application. In any event, if administrative inconvenience is a consequence the remedy lies with Parliament **[40-45]**.

The Court found considerable modern authority which supported the Court of Appeal's statement of principle that the power to grant bail presupposes the existence of and the ability to exercise the power to detain lawfully. **[47-51]**. However, this is not necessarily a principle of universal application. While the clearest possible words would be required to achieve a contrary result, Parliament could do so **[53]**.

In the circumstances it was not necessary to address the arguments under Article 5 ECHR which added nothing to the resolution of the issues on appeal **[56].**

References in square brackets are to paragraphs in the judgment